

UNITED STATES OF AMERICA : CRIMINAL ACTION
v. :
TYRON MCFADDEN : No. 15-376-1

Tyron McFadden pled guilty to a host of charges arising out of a large scale drug trafficking conspiracy that involved coast-to-coast distribution of both marijuana and cocaine from 2009 into 2015. Specifically, pursuant to a superseding indictment, Mr. McFadden¹ was charged with - - and pled guilty to - - one count of conspiracy to distribute 5 kilograms or more of cocaine and 1,000 kilograms or more of marijuana, four counts of aiding and abetting possession with intent to distribute a mixture and substance containing 500 grams or more of cocaine, one count of aiding and abetting the distribution of 500 grams or more of cocaine, one count of aiding and abetting the distribution of marijuana, and one count of conspiracy to commit money laundering. He also agreed not to contest forfeiture as set forth in the notice of forfeiture.

¹ This prosecution, and at least one related case, involves a number of members of the McFadden family, three of whom are men. In this Opinion, reference to “Mr. McFadden” means Tyron McFadden. To the extent mention is made to other McFaddens, their full names are used.

personal history. Mr. McFadden objected to a number of the proposed enhancements, and the Government argues for their appropriateness.

In order to rule on the objections to the proposed enhancements the Court conducted hearings over the course of several days, each of which was transcribed. The Court reviewed those transcripts, again reviewed the exhibits offered by the parties and the memoranda submitted by counsel, all of which were summarized and supplemented by counsel's very able oral arguments. The results of that process, aided, as needed, by the Court's knowledge of this case generally, follow.²

I. Aggravating role as “a leader” (Guideline 3B1.1(a))

Here, the question is whether Mr. McFadden qualifies as a leader - - hence earning a 4-level enhancement. According to his counsel, Mr. McFadden was prepared to accept a 3-level enhancement as supervisor or manager, but he disputes the fourth additional point.

Section 3B1.1(a) of the Guidelines draws a distinction between an “organizer or leader” and a “manager or supervisor.” An organizer or leader of a criminal activity that involves five or more participants (as all agree does the extensive conspiracy here) draws four points. Application Note 4 in this Guideline focuses not on titles but rather on function, including, most prominently, on the exercise of decision-making authority, the nature of the defendant's participation, possible activities relating to recruitment, the defendant's claim to a greater portion of the ill-gotten proceeds, the degree of the defendant's participation in planning or organizing

² The Court writes primarily for the parties who are intimately familiar with the complicated and lengthy history of the criminal activities at issue and with the prosecution of Mr. McFadden and his many co-conspirators. Consequently, only those facts pertinent to the rulings are presented in this opinion. The Court notes, however, that this case, and its related cases at Cr. No. 13-321, Cr. No. 15-175 and Cr. No. 15-388, involve 17 defendants, some of whom filed pretrial motions. The motions involved substantive recitation of certain of the facts of the case. See e.g., Cr. No. 15-376 at Doc. Nos. 224 and 232.

the enterprise's activities, the defendant's control over others, and the like. This Application Note also reminds the sentencing court that there can be more than one person who so qualifies as "a leader." Principal case law guidance from the Third Circuit Court of Appeals appears in United States v. Botsvynyuk, 552 F. App'x 178 (3d Cir. 2014); United States v. Helbling, 209 F.3d 226 (3d Cir. 2000); United States v. Phillips, 959 F.2d 1187 (3d Cir. 1992); United States v. Ortiz, 878 F.2d 125 (3d Cir. 1989).

Here, the record is clear that the criminal activity at issue was extensive, involving many more than five people. Therefore, the inquiry is whether there is a preponderance of evidence³ in the record that Mr. McFadden functioned as a leader in that activity. He did. Special Agent Jessica Fear, one of the fully engaged case agents for most of the years of the criminal enterprise at issue, testified during the sentencing hearings that Mr. McFadden controlled "almost every single aspect" of the conspirators' acquisition and distribution of drugs. Hrg. 10/9/18 at N.T. 69–70. The agent's assessment was amply supported by Mr. McFadden's own colorful words as recorded on the tapes of his phone conversations from his time in jail. These calls show that Mr. McFadden decided which banks the conspirators would use for deposits of "tens of thousands of dollars" (id. at N.T. 56); he identified particular customers for the group's products (id. at N.T. 56–57); he organized the movement of drugs from California to Philadelphia (id. at N.T. 18); and he outlined the arrangements for and use of the conspiracy's North Hollywood apartment in Southern California (id. at N.T. 53-54). Mr. McFadden's control was so effective that he was unabashedly confident in denying the request of one of the members in the conspiracy to leave California to come home to Philadelphia to visit a sick relative. Id. at N.T.

³ There was no dispute in connection with this sentencing that, as to all of the matters to be evaluated, the proper burden of proof is that which requires a preponderance of the evidence. See e.g., United States v. Grier, 475 F.3d 556 (3d Cir. 2007) (holding that facts relevant to the advisory sentencing guidelines need only be proved by a preponderance of evidence).

51. In an especially ironic act demonstrating his personal sense of leadership in the context of this case, from jail following his and others' state law arrest for drug crimes, Mr. McFadden outlined how one co-conspirator was to "take the case" (i.e., admit over-all guilt), thereby ensuring the acquittal of others, including himself. Id. at N.T. 81–82.

Mr. McFadden's counsel argues against this leadership enhancement by contending that the Government has not sufficiently established that Mr. McFadden is "the" leader, given also that, according to the defense, some participants in the conspiracy operated independently from Mr. McFadden, and hence, these others controlled other members in the conspiracy. The defense also argues that the Government did not establish that Mr. McFadden laid claim to a larger share of the fruits of the conspiracy's activities.

These defense arguments miss the points of the Guidelines and the attendant case law. As outlined above, there need not be a single, supreme leader for this enhancement to apply. And, indeed, for purposes of evaluating someone's status as a leader, the Government need not prove - - or even offer evidence pertaining to - - every one of the factors used variously to discern leadership status. See Helbling, 209 F.3d at 243 (leadership enhancement approved even though co-conspirators could be "equally responsible" for criminal activity); Ortiz, 878 F.2d at 127 (leadership enhancement assigned despite no evidence on apportioning of fruits of criminal activity).

In this case, on this record, a preponderance of the evidence shows that Mr. McFadden exercised significant control over the operations and operators of this conspiracy, and there is no competing evidence that he had any functioning peers, much less superiors, in the activities at issue. He, through his actual and intended efforts, earned the 4-point "leadership" designation.

II. Dangerous Weapon Enhancement

The probation officer and the Government propose that the 2-level “dangerous weapon” enhancement found in Guideline § 2D1.1(b)(1) should apply in this case even though there is no contention that Mr. McFadden ever used or brandished a weapon himself. It may well not be reversible error to apply this enhancement to Mr. McFadden, given that much of the case law allows for a very liberal application of this enhancement.⁴ However, the Court concludes that to do so here would be too elastic a stretch of this Guideline’s most sensible application where there is no argument, much less evidence, that Mr. McFadden either had a gun on his person or in his home during the time or in connection with the activities at issue. See, e.g., United States v. Hockaday, 390 Fed. App’x 101, 103–04 (3rd Cir. 2010); United States v. Surine, 375 Fed. App’x 164, 170 (3rd Cir. 2010); United States v. Gomez, 540 Fed. App’x 143, 145 (3rd Cir. 2013); United States v. Napolitan, 762 F.3d 297, 310–11 (3rd Cir. 2014). Moreover, there is no evidence in this record that there was widespread weapons usage within this conspiracy or that, to the extent there were any incidents of gun usage, Mr. McFadden knew about it ahead of time, but rather only after-the-fact. To be sure, co-conspirators informed Mr. McFadden on two occasions that they had or had used guns, presumably in association with trafficking drugs. In one instance, co-conspirator Jared Richardson told Mr. McFadden that he (Mr. Richardson) was going to get a gun because fellow conspirator Jamel Warren stole his (Mr. Richardson’s) Gucci belt. (The connection between a designer belt and drug distribution was not explained to the

⁴ Guideline § 2D1.1 cmt n.3 states that the 2-point enhancement should be applied “if the weapon was present, unless it is clearly improbable that the weapon was connected to the offense.” (emphasis added). The Government has the burden to show the propriety of the enhancement, but need only show that the defendant “possessed” a dangerous weapon, and it can make such a showing by presenting evidence of a temporal and spatial relation between a weapon, the drug trafficking activity and the defendant. United States v. Napolitan, 762 F.3d 297, 309 (3rd Cir. 2014). The burden then shifts to the defendant to show that the connection was “clearly improbable.” Id. The Court’s observation in the text as to the ease of application of this enhancement is reflected in the rueful appellate understatement and assessment that “[i]t appears that the defendants have rarely been able to overcome the ‘clearly improbable’ hurdle.” United States v. Drozdowski, 313 F.3d 819, 822 (3rd Cir. 2002).

Court or was not otherwise readily apparent.) Hrg. 10/9/18 at N.T. 99–100. In another instance, Mr. McFadden was told that his brother Talli McFadden had shot at co-conspirator Edward Higgins. Id. at N.T. 100. It seems that Mr. Higgins had stolen over a pound of marijuana from Mr. McFadden and his brother Talli shot at Mr. Higgins in filial retaliation. Id. Finally, in December 2014 it appears that Mr. McFadden lived for an unspecified time with his sister and co-conspirator Tedkieya McFadden at a residence where it seems a gun and marijuana were kept, though no one contends Mr. McFadden brought the weapon to the house or knew it was there. Id. at N.T. 102–03.

The case most similar to this one on the issue at hand is United States v. Mack, 78 Fed. App'x 171 (3rd Cir. 2003). In Mack, the defendant ran the North Carolina arm of a New Jersey-based drug operation. The defendant had argued that his geographic distance from the hub of the operations made it unforeseeable that co-conspirators possessed firearms or that those firearms were used in furtherance of the conspiracy he joined. The Third Circuit Court of Appeals nonetheless recognized that firearms are ‘tools of the trade’ in a drug operation, and thus it was foreseeable that a drug conspiracy as large as the one in that case would involve possession of firearms. Id. at 182. In Mack, however, the drug operation actors had stockpiled weapons, and guns had been found in a car that the defendant himself had used to effectuate drug deals. Thus, the court there concluded that it was “not clear error” for the sentencing court to find that it was foreseeable that the defendant’s co-conspirators possessed weapons during drug trafficking and while making deals. Id. at 183.

In the overall context of this case, including the quantity and quality of the evidence on the firearms enhancement, the other sentencing issues discussed in this Opinion and in connection with Mr. McFadden’s sentencing generally, and the arguments for and against all of

the various enhancements, the Court declines to conclude that the after-the-fact gun references by two members of the conspiracy to Mr. McFadden, without more, beyond an almost too convenient assumption about “tools of the trade,” should be a basis for application of this enhancement.

III. “Credible Threat of Violence” Enhancement

The same cannot be said of Section 2D.1.1(b)(2) of the Sentencing Guidelines which authorizes a 2-level enhancement if “the defendant used violence, made a credible threat to use violence, or directed the use of violence.” Although this record does not present evidence that Mr. McFadden himself actually used violence, and in spite of the dearth of case law in any circuit⁵ concerning this enhancement for a “credible threat,” the Court concludes that application of the enhancement is appropriate here.

On March 31, 2015, Mr. McFadden made a phone call among Mr. McFadden, co-operating witness Talli McFadden, Theodore McFadden and an unidentified man. The call was recorded. The discussion among them included reference to Talli McFadden shooting at “Whiz” (also known as Edward Higgins, Jr.) for stealing a pound of exotic marijuana from Mr. McFadden. During the call, Mr. McFadden states that while he is glad that no one was shot, he wants to put Mr. Higgins in a car, beat him, dress him in a wig and lipstick, and force him to walk home naked on a major vehicle thoroughfare. These are not after-the-fact musings, but rather voluntary statements of unambiguous intentions to seriously intimidate someone who has allegedly undermined or thwarted Mr. McFadden’s possession of drugs. Mr. McFadden details the steps he wants taken, and those steps are credible threats against Mr. Higgins, a person

⁵ Such case law as there is on this issue comes from other circuits and provides very little guidance. See, e.g., United States v. Sykes, 854 F.3d 457, 460–61 (8th Cir. 2017) cert. denied, 138 S. Ct. 346 (2017) (upholding application of enhancement); United States v. Redifer, 631 Fed. App’x 548, 562–64 (10th Cir. 2015) (same); United States v. Walker, 578 Fed. App’x 812, 820 (11th Cir. 2014) (same).

clearly known to the participants on the call. They warrant imposition of this 2-step enhancement.

IV. Maintaining Premises for the Purposes of Manufacturing or Distributing a Controlled Substance.

Guideline Section 2D1.1(b)(12), sometimes called the “stash house” enhancement, provides for a 2-level addition “if the defendant maintained a premises for the purpose of manufacturing or distributing a controlled substance.” In the Third Circuit, for the “stash house” enhancement to apply, the Government “must prove . . . that the defendant ‘(1) knowingly (2) open[ed] or maintain[ed] any place (3) for the purpose of manufacturing or distributing a controlled substance.’” United States v. Carter, 834 F.3d 259, 261 (3rd Cir. 2016) (quoting United States v. Johnson, 734 F.3d 444, 447 (6th Cir. 2013)). Here, the evidence concerning the conspiracy’s use of an identified North Hollywood, California, apartment from mid-2011 through early 2012 suffices to show by a preponderance of the evidence that each of these three elements is satisfied as to Mr. McFadden.

As to the first element, i.e., “knowledge,” there is no dispute that Mr. McFadden knew about the North Hollywood apartment. Special Agent Fear testified that Mr. McFadden knew that co-conspirator Talli McFadden secured the apartment for the benefit of the illegal enterprise. Hrg. 10/9/18 at N.T. 46. This testimony is amply supported by recordings of Mr. McFadden’s phone conversations with his co-conspirators. For example, the recorded June 24, 2011 call includes Mr. McFadden’s direct acknowledgement of the apartment, and he expressly tells his sister and co-conspirator, Tedkieya McFadden, that he wants to keep the apartment. Id. at N.T. 52.

With respect to the second element, namely, “opening” or “maintaining” the place, it is not necessary “that the defendant be physically present or involved on a daily basis to ‘maintain’ premises.” Carter, 834 F.3d at 262. This is because “the enhancement is flexible and adaptable to a variety of factual scenarios [and] [a] court may consider, among other things, whether a defendant exercised control over the property or supervised or directed others to engage in certain activities at the premises.” Id. (internal citations and quotations omitted).

Applying these factors, the Third Circuit Court of Appeals ruled in Carter, for example, that the defendant “maintained” the premises at issue there. Id. The court rejected the defense argument that emphasized the absence of a possessory interest given that the defendant neither owned nor leased the premises. Rather, the court emphasized that Mr. Carter played a major role in overseeing the illegal activities occurring at the premises; he controlled the funds used to pay for the property and directed his co-conspirators to pay the expenses; his co-conspirator looked to the defendant for approval to rent the premises; and the defendant had personally approved of the premises after they were rented. Id. at 262–63.

Here, the evidence shows that Mr. McFadden supervised the activities at the North Hollywood apartment. When Tedkieya McFadden wanted to move Talli McFadden’s possessions from the apartment after Talli had been arrested in 2011, Mr. McFadden directed her not to do so. He observed that the apartment was “still gonna come in handy” and went on to instruct his sister to keep James Bullard (another co-conspirator) at the apartment because “he ain’t gonna let nobody” mess it up. Hrg. 10/9/18 at N.T. 53–54. Then, again, when Jared Richardson, yet another co-conspirator, informed Mr. McFadden that their fellow conspirator, Johnny Beamon, wanted to return from California to visit an ailing relative in Philadelphia, Mr. McFadden stated “that’s not happening. We’re going to hold him up . . .” Id. at N.T. 51.

Moreover, Mr. McFadden - - at least during the summer of 2011 - - controlled the funds used to secure the apartment, while directing his co-conspirators to pay the attendant expenses. Special Agent Fear testified concerning a June 24, 2011 phone call during which Mr. McFadden admitted that he gave \$4,500 to a co-conspirator for the express purpose of paying rent for the apartment. Id. at N.T. 52–53. The agent also recounted Mr. McFadden’s July 12, 2011 recorded call during which Mr. McFadden instructed a co-conspirator to handle half of the rent for the North Hollywood apartment.

Although there is no evidence showing that Mr. McFadden explicitly selected this apartment, exercised day to day detailed decision-making duties for it or put his name personally on the lease, Mr. McFadden exercised sufficient control over its maintenance and use to satisfy the “maintain” element.

Turning to the third element, namely whether the premises were “kept primarily to advance the drug enterprise,” as opposed to being a place where drug trafficking was an “incidental or collateral use,” Carter, 834 F.3d at 262, the Court concludes that this element, as interpreted by appellate courts, has been satisfied here because there is no requirement that drug distribution be the sole reason for maintaining the premises. See, e.g., United States v. Jones, 778 F.3d 375, 384–85 (1st Cir. 2015) (“[O]ne thing is clear: for the enhancement to apply, drug distribution need not be the sole reason that a defendant maintains the premises.”). According to this Guideline’s comment note 17, it is the intention of the enhancement to apply if drug distribution is a “primary or principal” use for the property. The details of such use are not limited to a particular manner of use.

In Carter, the Third Circuit Court of Appeals concluded that the properties at issue were kept primarily to advance the drug enterprise, pointing to two facts: (1) that law enforcement personnel found drugs and drug paraphernalia on the properties; and (2) that Mr. Carter’s co-conspirators testified that the premises were regularly used to store drugs prior to distribution and that the reason for renting the property was to provide Mr. Carter’s co-conspirator a place to live and work while he was “on assignment” at Mr. Carter’s behest. 834 F.3d at 262.

Here, although there is no evidence that drugs or drug paraphernalia were ever found at the North Hollywood apartment, there was evidence that it was used to store and package drugs in preparation for the couriers coming from Philadelphia and served as a place for Mr. McFadden’s co-conspirators to stay while they were “on assignment.” Specifically, Special Agent Fear testified that the North Hollywood apartment was used as a place to “bring the drugs back, to wrap the drugs, to store the drugs until the drugs [were] sent with couriers on airplanes back to Philadelphia.” Hrg. 10/9/18 at N.T. 46. Special Agent Fear further explained that at least three co-conspirators stayed in the North Hollywood apartment and used it while they were on assignment in California. Id. at N.T. 71–72. This allowed the conspiracy to cut costs that otherwise would have been spent on California hotels. Id. at N.T. 46. Finally, the evidence shows that the premises were maintained primarily to further the conspiracy because, as discussed above, when Tedkieya McFadden wanted to get rid of the North Hollywood apartment, Mr. McFadden refused because the apartment would “come in handy” for their operation. Id. at N.T. 51–52.

For these reasons, the stash house enhancement applies to Mr. McFadden.⁶

⁶ At October 9, 2018 sentencing hearing, the Government also argued that two residences in Upper Darby, Pennsylvania and co-conspirator Brianne Barth’s Long Beach, California home were used as “stash houses” in this

V. Committing the Offense as Part of a Pattern of Criminal Conduct Engaged in as a Livelihood - - Guideline § 2D1.1(b)(15)(E)

Section 2D1.1(b)(15)(E) of the Sentencing Guidelines provides for a 2-level increase if the defendant receives a leadership adjustment under § 3B1.1 and “committed the offense as part of a pattern of criminal conduct engaged in as a livelihood.” Guidelines Section 4B1.3 Application Note # 2 states that:

Engaged in as a livelihood” means that “(A) the defendant derived income from the pattern of criminal conduct that in any twelve-month period exceeded 2,000 times the then existing hourly minimum wage under federal law; and (B) the totality of the circumstances show that such criminal conduct was the defendant’s primary occupation in that twelve-month period (e.g., the defendant engaged in criminal conduct rather than regular, legitimate employment; or the defendant’s legitimate employment was merely a front for the defendant’s criminal conduct).

Here, as discussed above, Mr. McFadden qualifies as a leader of this conspiracy under § 3B1.1. Thus, in order to apply the criminal livelihood enhancement, the Court must find by a preponderance of the evidence that Mr. McFadden: (1) derived income from the pattern of criminal conduct that in any 12-month period exceeded 2,000 times the federal minimum wage, (in this case \$14,500⁷); and (2) that such criminal conduct was Mr. McFadden’s primary occupation in that 12-month period. See United States v. Nastri, 647 Fed. App’x. 51, 54 (2d Cir. 2016). Courts have applied the criminal livelihood enhancement despite evidence that the defendant has “earned some money by other means,” as long as the criminal activity was the defendant’s “primary source” of income. United States v. Molina-Sanchez, 630 Fed. App’x 173, 176, 177 (4th Cir. 2015) (affirming district court’s application of criminal livelihood enhancement despite evidence showing that defendant operated a lawn mowing business); see

conspiracy. However, because the Government focused on the North Hollywood apartment in its supplemental sentencing briefing and because the evidence supports applying the stash house enhancement based on the conspiracy’s use of the North Hollywood apartment, the Court does not address the other potential “stash houses.”

⁷ The federal minimum wage during this conspiracy was \$7.25 per hour. 2,000 times \$7.25 is \$14,500.

also United States v. Ramos-Mendez, 1991 U.S. App. LEXIS 1407, at *13 (9th Cir. 1991) (affirming district court’s application of criminal livelihood enhancement despite evidence showing that defendant earned some money repairing cars).

In this case, the Government targets a period of time between fall 2009 and 2010 in which Mr. McFadden directly participated in nine trips back and forth between California and Philadelphia to purchase drugs. Hrg. 10/9/18 at N.T. 114. Based on a review of the evidence, the Court determines that the Government has satisfied both elements, and the criminal livelihood enhancement should apply to Mr. McFadden.

Considering only the nine trips between the fall of 2009 and 2010 in which Mr. McFadden directly participated, Special Agent Fear testified that Mr. McFadden and his co-conspirators brought back to Philadelphia approximately 100 pounds of marijuana per trip, noting that these estimates were conservative and that many of the trips involved twice that amount of marijuana. Id. at N.T. 122. Based on this 100 pound per trip estimate, and accounting for the purchase price of the marijuana in California and the expenses associated with the nine trips, Special Agent Fear testified that the conspiracy likely earned profits of \$27,250 per trip. Id. at N.T. 122–123. Doing the math, the agent concluded that the conspiracy earned approximately \$245,000 over the course of the nine trips. Id. at N.T. 123. Even assuming, as defense counsel argues, that Mr. McFadden was only entitled to a fourth or fifth of the profits from these trips, he would have received, at the very least, profits of \$61,250 or \$49,000.⁸ Id. at N.T. 153–154. Thus, a preponderance of the evidence shows that Mr. McFadden earned well over \$14,500 in profits between the fall of 2009 and 2010.

⁸ These numbers not only involve conservative estimates as to the amount of marijuana transported per trip, but also exclude any proceeds earned from cocaine distribution during this time frame. Hrg. 10/9/18 at N.T. 124–126. Thus, it is likely that the conspiracy’s actual profits during this timeframe were much higher, and, logically, Special Agent Fear testified that Mr. McFadden “profited hundreds of thousands of dollars.” Id. at N.T. 155.

Next, the Court must determine whether the conspiracy was Mr. McFadden's primary occupation during the relevant year.

At the sentencing hearing, the Government presented evidence concerning Mr. McFadden's 2010 tax records, claiming that these records show that he did not engage in any legitimate employment. Gerald Loke, a senior financial investigator with the Organized Crime Drug Enforcement Task Force, testified that Mr. McFadden's 2010 tax records reported total wages of \$12,106 for alleged employment at "Brown's Super Stores" in Bellmawr, New Jersey. Id. at N.T. 170–71. Mr. Loke further testified that, as part of his investigation, he reached out to Brown's Super Stores to inquire about Mr. McFadden. A representative from Brown's Super Stores informed Mr. Loke that they had "no record of a past or present employee named Tyron McFadden." Id. at N.T. 173–74.

Acknowledging Mr. McFadden's deficient tax records, defense counsel instead argues that Mr. McFadden worked a number of jobs "under the table" and did not pay income taxes. To this effect, defense counsel presented a series of exhibits at the sentencing hearing, allegedly showing that Mr. McFadden worked as a cleaner and a laborer. However, only two of these exhibits pertain to the relevant 2009 through 2010 time frame targeted by the Government for purposes of this enhancement: (1) an October 5, 2009 letter from L&L Property Management; and (2) a January 25, 2010 letter from L&L Property Management.⁹ Although these letters do not state Mr. McFadden's hourly wage, the letters claim that he worked at L&L Property as a laborer from 9:00 a.m. to 4:30 p.m. or 5:00 p.m., Monday through Friday.

⁹ Defense counsel also introduced: (1) a copy of a February 8, 2011 check from L&L Property Management; (2) a February 2011 United States Probation Office Monthly Supervision Report and (3) an October 2012 United States Probation Office Monthly Supervision Report allegedly showing that Mr. McFadden engaged in other legitimate employment. However, evidence of Mr. McFadden's employment after the fall 2009 through 2010 time frame targeted by the Government for purposes of the criminal livelihood enhancement is irrelevant here.

However, Special Agent Fear testified that that she believed Mr. McFadden was not legitimately employed at L&L Property Management. Id. at N.T. 149. Specifically, Special Agent Fear testified that she received information from a co-operating witness that Larry Brown operated L&L Property as a front to mislead his own probation officer, and that Mr. Brown was a close associate of Mr. McFadden and the two men were involved in dealing drugs together. Id. at N.T. 149.

The totality of this evidence supports a finding that Mr. McFadden's primary occupation was working as a drug distributor from the fall of 2009 to 2010. First, it is clear from the record that Mr. McFadden never worked at Brown's Super Stores in Bellmawr, New Jersey. Second, Special Agent Fear's testimony suggests that L&L Property Management was just a front designed to appease supervising officers. And, even if the Court accepts defense counsel's argument that L&L Property Management was not a front, it is unlikely that Mr. McFadden could work that job 9 a.m. to 5 p.m., five days a week and still find time to travel to and from California, as the evidence shows. Finally, even if Mr. McFadden did maintain legitimate employment at L&L Property Management during this time, nothing on the record shows that Mr. McFadden's wages from this job came even remotely close to the profits he realized from the drug conspiracy. Thus, as in Molina-Sanchez and Ramos-Mendez, despite some evidence that Mr. McFadden may have engaged in legitimate employment, the preponderance of the evidence supports a finding that his primary occupation from the fall of 2009 to 2010 was the drug trade, and the criminal livelihood enhancement is appropriate.

VI. Obstructing or Impeding the Administration of Justice

The Government also seeks to apply a sentencing enhancement for obstruction of justice, under U.S.S.G. § 3C1.1. Specifically, the Government made an offer of proof that Mr.

McFadden instructed multiple co-conspirators to falsely take the blame for 2011 Pennsylvania state court drug charges brought against Mr. McFadden and several others. The facts giving rise to the state court drug charges are also included in the at-issue federal indictment. Because Mr. McFadden at least obstructed his federal prosecution by instructing his associates to lie about the responsibility for the state court charges, application of the § 3C1.1 enhancement is proper.

Section 3C1.1 of the Sentencing Guidelines provides for an enhancement where:

(1) the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice with respect to the investigation, prosecution, or sentencing of the instant offense of conviction, and (2) the obstructive conduct related to (A) the defendant's offense of conviction and any relevant conduct; or (b) a closely related offense[.]

(emphasis added).

The Third Circuit Court of Appeals has interpreted § 3C1.1 to reach conduct that obstructs any investigation, federal or state, so long as the “conduct being investigated gave rise to the [federal] criminal charge ultimately decided upon.” United States v. Imenec, 193 F.3d 206, 208 (3d Cir. 1999). “A § 3C1.1 enhancement is appropriate where the defendant has obstructed an investigation of the criminal conduct underlying the offense of conviction, even where the investigation was being conducted by state authorities at the time.” Id. at 209. The court has further clarified that “where the obstructive conduct relates only to an ongoing state prosecution, with no discernable effect on the federal proceedings, enhancement under U.S.S.G. § 3C1.1 is improper.” United States v. Jenkins, 275 F.3d 283, 290 (3d Cir. 2001) (emphasis added). The crucial determination, therefore, is whether there is a “nexus between the defendant's obstructing ongoing state proceedings,” on the one hand, and the “investigation, prosecution, or sentencing of the federal offense,” on the other. Id. at 291. And since Jenkins,

an Application Note to § 3C1.1 interprets the provision more broadly, providing that “[o]bstructive conduct that occurred prior to the start of the investigation of the instant offense of conviction may be covered by this guideline if the conduct was purposefully calculated, and likely, to thwart the investigation or prosecution of the offense of conviction.” Sentencing Guidelines for United States Courts, 71 Fed.Reg. 28,063, 28,072 (May 15, 2006); see also United States v. Weikal-Beauchat, 640 F. App’x 219, 222 (3d Cir. 2016), cert. denied, 136 S. Ct. 2457 (2016) (affirming district court sentence relying on application note and describing lower court as “[b]ound by this application note”).

Here, Mr. McFadden allegedly obstructed 2011 Pennsylvania state drug charges. On May 18, 2011, local authorities raided Mr. McFadden’s home. The officers discovered and seized drugs and also arrested Mr. McFadden and several others who were in the home at the time of the raid. After being charged, Mr. McFadden convinced a co-conspirator, Corey Munford, to falsely testify that the drugs did not belong to Mr. McFadden. Instead, Mr. Munford testified that the drugs actually belonged to Mr. McFadden’s brother, whose drug charges had already been dismissed with prejudice. Mr. Munford’s false testimony, at Mr. McFadden’s direction, very likely (and logically would have) caused the acquittal of Mr. McFadden and several others. And although the Superseding Indictment in Mr. McFadden’s federal case still included allegations concerning the May 18, 2011 drug bust, the Government obviously lacked evidence from the state court proceeding that it might have otherwise had, absent Mr. McFadden’s obstruction (i.e., Mr. Munford’s orchestrated testimony) of the state drug charges.

According to the Government, Mr. McFadden’s obstruction affected the federal proceedings in two ways.

First, Mr. McFadden allegedly obstructed the prosecution of the instant federal offenses. Because the federal indictment includes the same conduct that formed the basis of the state court charges, there is a “nexus” between the obstruction and the federal offense. Jenkins, 275 F.3d at 289. If Mr. McFadden had not obstructed the state court drug charges, (1) the related allegations in the federal indictment may have been easier to prove, by way of a state court conviction, and (2) the state court conviction or testimony from the state court proceedings would have provided useful impeachment evidence in the federal case against Mr. McFadden. Further, the Government argues that even if the obstruction did not have any actual effect on the federal prosecution, it was certainly “purposefully calculated” to thwart the prosecution of conduct that is included in the superseding indictment here. See Weikal-Beauchat, 640 F. App’x at 222.

Second, Mr. McFadden allegedly obstructed the sentencing of the instant federal offenses. The Government asserts that Mr. McFadden would have faced an even higher criminal history calculation, and a 20-year mandatory minimum, if he had been convicted of the state charges. See, e.g., 21 U.S.C. § 841(b)(1)(A) (“If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 20 years and not more than life imprisonment”).

Mr. McFadden argues that the Government makes too large of an assumption by presuming that he would have been convicted of the state court charges absent his obstruction of justice. It is not clear, however, whether Mr. McFadden is correct that it is a “mighty leap” to assume that he would have been convicted of at least some of the state charges, given the physical evidence against him. The Court sees it more as a modest “step.” Furthermore, Mr. McFadden ignores that it was undoubtedly his intent to “thwart the investigation or prosecution”

of the conduct that formed the basis of the state offense, for which he has now accepted responsibility. This in and of itself is sufficient to trigger § 3C1.1. See Weikal-Beauchat, 640 F. App'x at 222.

Mr. McFadden also misses the point by focusing on the (likely or not) outcome of the state court proceeding with respect to the obstruction's effect on his federal prosecution. Instead, it is crucial that he attempted to obstruct the state prosecution of the very same underlying conspiracy and conduct for which he has now been convicted, and at a time when there was an ongoing federal investigation into his conduct. Hrg. 10/9/18 at N.T. 191. This creates an undeniable nexus between the obstruction and the federal offense. Jenkins, 275 F.3d at 289–90. Indeed, regardless of the outcome of the state court proceedings, the mere occurrence of a full trial on the state court charges arguably would have made the federal prosecution easier, because the state court proceedings would have created a record implicating some of the same conduct at issue here. For example, any testimony given in the state court proceeding could have been used to impeach any witnesses who later tried to change his or her testimony in the federal proceeding. See, e.g., Fed. R. Evid. 613.

Mr. McFadden's conduct was purposefully calculated to thwart the prosecution of conduct underpinning his current guilty plea, and there is a discernible nexus between his obstruction and its effect on the prosecution of his federal charges. For these reasons, it is appropriate to apply the § 3C1.1 enhancement here.

VII. Forfeiture

The Government requests entry of an order that Mr. McFadden forfeit \$606,900 and real property located at 6213 Larchwood Avenue in Philadelphia, Pennsylvania. Mr. McFadden

challenges the Government's request for \$606,900, specifically arguing that it is contrary to the Supreme Court's decision in Honeycutt v. United States, 137 S. Ct. 1626 (2017). Based on the Court's review of the case law, the Government's request for forfeiture is fully consistent with Honeycutt. The Government has clarified on the record, at the Court's request, the methodology it used for reaching the \$606,900 forfeiture amount.

Forfeiture for drug offenses is governed by 21 U.S.C. § 853(a)(1). Under § 853(a)(1), defendants convicted of certain drug offenses under Title 21 must forfeit "any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as the result of such violation." Defendants may not, however, be found "jointly and severally liable for property that his co-conspirator derived from the crime but that the defendant himself did not acquire." Honeycutt, 137 S. Ct. at 1630. Instead, "[f]orfeiture pursuant to § 853(a)(1) is limited to property the defendant himself actually acquired as the result of the crime." Id. at 1635. Nonetheless, a court can order a defendant to forfeit property that he has acquired indirectly, especially where the defendant is a leader of an illegal operation. "[A] marijuana mastermind might receive payments directly from drug purchasers, or he might arrange to have drug purchasers pay an intermediary such as [couriers]. In all instances, he ultimately 'obtains' the property—whether 'directly or indirectly.'" Honeycutt, 137 S. Ct. at 1633; see also United States v. Tartaglione, No. CR 15-491, 2018 WL 1740532, at *21 (E.D. Pa. Apr. 11, 2018) (citing Honeycutt, 137 S. Ct. at 1633) ("Even when proceeds are received through an intermediary or a corporate entity, a defendant still receives the proceeds for purposes of forfeiture, given that forfeitable property may be obtained directly or indirectly.").

The Government's forfeiture request does not run afoul of Honeycutt. The requested order does not impose joint and several liability on Mr. McFadden for profits he did not obtain;

rather, the Government seeks forfeiture of proceeds that Mr. McFadden obtained, directly or indirectly, as a leader of a drug operation. See Honeycutt, 137 S. Ct. at 1630, 1633. In his plea agreement, Mr. McFadden admitted that the drug ring distributed at least 15 kilograms of cocaine and at least 1,000 kilograms, or 2,200 pounds, of marijuana in furtherance of the conspiracy. Guilty Plea Agreement at 5. And the record establishes that Mr. McFadden was akin to the “marijuana mastermind” described in Honeycutt, and thus “directly or indirectly” responsible the entire drug distribution operation. 137 S. Ct. at 1633. As discussed above, Mr. McFadden was a leader of the drug organization. Special Agent Fear testified, for example, that Mr. McFadden led the organization even from prison, when he controlled “almost every single aspect” of his co-conspirator’s acquiring and distributing drugs. Hrg. 10/9/18 N.T. at 69–70. Mr. McFadden decided what banks the drug ring used, id. at N.T. 56; he identified customers, id. at N.T. 56–57; he arranged for couriers to transport drugs from California to Philadelphia, id. at N.T. 180; he supervised the apartment the organization maintained in California, id. at N.T. 53–54; and he even refused to allow an organization member to travel from California to Philadelphia to visit a sick relative. Id. at N.T. 51. Lastly, when Mr. McFadden and various other co-conspirators were arrested for drug possession, he was the person who arranged for a co-conspirator to “take the case,” thereby ensuring the acquittal of all of the others arrested—himself included. Id. at N.T. 81–82. The Government has therefore properly requested an order of forfeiture. Although Mr. McFadden may have used “intermediar[ies],” such as couriers, to distribute the drugs, “[i]n all instances, he ultimately ‘obtain[ed]’ the property—whether ‘directly or indirectly.’” Honeycutt, 137 S. Ct. at 1633.

Finally, although a forfeiture order was proper in general, the Government's proposed forfeiture of \$606,900 needed further explanation.¹⁰ At the October 22, 2018 hearing the Government further explained its methodology for determining the value per pound or per kilogram of each drug. The Government identifies the price of marijuana as \$1,000 per pound, the price of exotic marijuana at \$1,750 per pound, and the price per kilogram of cocaine as several different amounts—sometimes \$32,000 per kilogram, other times \$16,000 per kilogram, and other times still \$13,950 per kilogram. The Government's proposed values reflected Special Agent Fear's testimony that the Philadelphia street value for cocaine is roughly \$30,000 per kilogram, *id.* at N.T. 124–25, and the Philadelphia street value for marijuana is roughly \$1,000 per pound. *Id.* at N.T. 122. As such, the \$1,000 per pound for marijuana is consistent with Special Agent Fear's testimony (and although Special Agent Fear did not testify about the street value of exotic marijuana, the Government submits that the \$1,750 per pound of exotic marijuana is “extremely conservative”). The Government has also explained why it used different prices for cocaine, and why those prices differ from those identified by Special Agent Fear during her testimony, all to reflect a very conservative allocation of proceeds to Mr. McFadden. Consequently, the form of order proposed by the Government is appropriate in this case.

¹⁰ The Government seeks forfeiture of Mr. McFadden's proceeds from selling 400 pounds of marijuana, 20 pounds of exotic marijuana, and 8 kilograms of cocaine, even though he admitted in his guilty plea to being responsible for distributing at least 2,200 kilograms of marijuana and 15 pounds of cocaine. In other words, the Government is seeking forfeiture of the proceeds from only a small portion of the drug sales for which Mr. McFadden has admitted direct or indirect responsibility. The Court saw no issue with this facet of the Government's proposal.

CONCLUSION

For the foregoing reasons, and as further articulated on the record at the sentencing hearing for Mr. McFadden the enhancements have been ruled upon as outlined above.

BY THE COURT:

S/Gene E.K. Pratter
GENE E.K. PRATTER
UNITED STATES DISTRICT JUDGE